

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL JAMES O'LEARY,

Defendant-Appellant.

UNPUBLISHED

October 28, 2003

No. 241721

Oakland Circuit Court

LC No. 01-179887-FH

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction for manufacture of five to forty-five kilograms of marijuana, MCL 333.7401(2)(d)(ii)¹, possession of a taser, MCL 750.224a, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to three years' probation for the possession of a taser and manufacture of marijuana convictions, and to two years in prison for the felony-firearm conviction. We affirm.

This case arises out of a search warrant executed on defendant's home on March 30, 2001. Defendant owned and lived in the home but was not there when the warrant was executed. Defendant arrived during the search. Police found a marijuana grow operation in the basement.

Police also observed a taser gun by the back door and a .22 caliber rifle in a closet with no door and which was located next to the front door in the family room. The rifle, on the main level of the house, was approximately fifty to sixty feet from the basement grow operation. The rifle was not loaded and no bullets were found in the house. Police found some suspected marijuana stalks or stems, approximately a foot long, in the fireplace of the same room, where the closet containing the rifle was located. In the office room on the main floor of the house were a digital scale, a heat sealer used to seal plastic bags, marijuana residue and hashish. Suspected marijuana seeds were on the desk and nightstand in the master bedroom and in various other places throughout the house.

¹ Although the jury verdict form and the judgment of sentence list the conviction as stated above, it should be accurately listed as "manufacture 20 marijuana plants or more, but less than 200 plants." This issue was not raised at trial or on appeal and therefore will not be discussed in detail.

Defendant argues that the trial court erred by refusing to direct a verdict for him on the felony-firearm charge because he did not have possession of the firearm at the time of the commission of the underlying felony. We disagree.

When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

The elements of felony-firearm are: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession may be actual or constructive and may be proved by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). A person can have constructive possession if the firearm is known to the person and is reasonably accessible to him. *Burgenmeyer, supra*, 461 Mich 437. It is not necessary to prove that a firearm is operable during the commission of the felony to satisfy an element of a felony-firearm prosecution. *People v Hill*, 433 Mich 464, 475; 446 NW2d 140 (1989).

In *Burgenmeyer, supra*, 461 Mich 431, the Supreme Court clarified constructive possession in a felony-firearm case. The Court stated that possession is not determined at the time of the raid or the arrest, but at the time that the felony is being committed. *Id.* at 438. The Court went on to state, "[a] drug possession offense can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it. In a case of that sort, the focus would be on the offense dates specified in the information." *Id.* at 439.

In the instant case, a reasonable trier of fact, when viewing the evidence in a light most favorable to the prosecution, may be persuaded beyond a reasonable doubt that defendant had constructive possession of the rifle during the commission of a felony. Because the possession element is not viewed at the time of the arrest, but at the time the felony was committed, and more specifically for an ongoing felony, at the time listed in the information, the controlling question is whether defendant possessed a firearm on or about March 30, 2001.

In finding that defendant had constructive possession, defendant must have known of the firearm, and it must have been reasonably accessible to him. *Burgenmeyer, supra*, 461 Mich 431. Here, defendant admitted that he knew that the rifle was in the closet, fulfilling the knowledge requirement. The rifle may also be determined to have been readily accessible to defendant during the felony of manufacturing marijuana because the circumstantial evidence shows that on or about March 30, 2001, the offense date, the manufacturing operation was being conducted throughout the entire house. The evidence to prove the presence of manufacturing beyond just the basement grow room includes the twelve inch stalks of marijuana plants that were found in the fireplace near the rifle, a heat sealer that defendant admitted was for sealing bags of marijuana, and the suspected marijuana residue and hashish that were discovered in various areas of the house. When these facts are viewed in the light most favorable to the

prosecution, a reasonable trier of fact could conclude beyond a reasonable doubt that the defendant had constructive possession of the rifle during the commission of a felony.

We affirm.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Jane E. Markey